BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DWAYNE KELLY SCOTT	)	
Claimant	)	
VS.	)	
	)	Docket No. 244,761
TOTAL INTERIORS, INC.	)	
Respondent	)	
AND	)	
	)	
CNA INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the November 30, 2001 Award of the Administrative Law Judge Robert H. Foerschler. Claimant was granted a 66.75 percent permanent partial general body disability after the Administrative Law Judge found claimant proved that he suffered accidental injury arising out of and in the course of his employment with respondent on the dates alleged. The Appeals Board (Board) held oral argument on May 21, 2002.

APPEARANCES

Claimant appeared by his attorney, Dennis L. Horner of Kansas City, Kansas. Respondent and its insurance carrier appeared by their attorney, Timothy G. Lutz of Overland Park, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

ISSUES

(1) Did claimant suffer accidental injury on the date or dates alleged?

(2) Did claimant's accidental injury or injuries arise out of and in the course of his employment with respondent?

(3) What is the nature and extent of claimant's injuries?

(4) Is claimant entitled to unauthorized medical treatment?

(5) Is claimant entitled to future medical treatment?

(6) What, if any, is the amount of compensation due?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds that the Award of the Administrative Law Judge should be modified.

Claimant began working for respondent on January 26, 1999, installing sheetrock. Claimant's job required that he hang sheetrock, which he described as 5/8-inch thick and 4 feet in width by 12 feet in length. Claimant testified the sheetrock weighed approximately 100 pounds. While lifting the sheetrock, claimant's back began to bother him.

The evidence is somewhat confused as to when claimant's symptoms began. At times, claimant describes his symptoms as beginning February 18, 1999, and at other times claimant discusses a sudden onset of pain on February 24, 1999.

Claimant's coworker, David Mitchell, acknowledged that the work performed by him and claimant was very physical and back complaints were not unusual.

Mr. Mitchell, however, testified that when claimant was asked, claimant advised he did not injure his back at work. Claimant discussed the problem with his supervisor, Jeffery Van Horn (the carpenter foreman), advising Mr. Van Horn that he did not injure his back at work and he did not want to make a claim for workers' compensation.

Claimant acknowledged this was an ongoing problem, but also testified that his work activities with respondent aggravated or accelerated his back pain.

Claimant first sought chiropractic treatment with Cleveland Chiropractic College Health Center (Cleveland Chiropractic) on February 25, 1999. At that time, he advised Cleveland Chiropractic that he had suffered no specific trauma. Claimant was diagnosed with chronic recurrent low back pain, associated with spondylolisthesis, Grade II; scoliosis of the lumbar spine, phase III; thoracic dysfunction, phase III; and cervical dysfunction, phase III. The history provided to Cleveland Chiropractic indicated claimant had a six-year history of chronic low back pain and his current pain symptoms were interfering with his ability to work.

Claimant had a history of low back problems in both 1993 and 1997. In 1993, claimant suffered back complaints, but sought no medical care. In 1997, claimant had pain in his low back. He sought medical treatment at that time, but did not pursue a workers' compensation claim. He was working for Midwest Drywall, doing sheetrock work at that time. He also received a chiropractic adjustment to his neck sometime between 1993 and 1997, but could not recall the exact date. He was treated by Max Pfrimmer, D.C., in November of 1997 for low back problems. The x-rays taken of claimant's low back by Dr. Pfrimmer's office were utilized during the litigation of this matter.

On April 21, 1999, claimant was evaluated by David A. Tillema, M.D., who diagnosed a grade I spondylolisthesis at L5-S1, with possible early nerve root impingement on the right. Unfortunately, neither Dr. Tillema nor anyone from Cleveland Chiropractic were deposed in this matter.

Claimant was referred to board certified orthopedic surgeon Glenn Amundson, M.D., by the Administrative Law Judge for both evaluation and treatment, with the first examination on June 23, 2000. Claimant advised Dr. Amundson he suffered a sudden onset of low back pain while lifting sheetrock on February 24, 1999. Dr. Amundson diagnosed spondylolisthesis at L5-S1, with degenerative disc disease at L5-S1 and also stenosis. He recommended surgery, and claimant was provided a surgical fusion at L5-S1 on October 17, 2000. Dr. Amundson returned claimant to work on February 2, 2001, finding claimant had reached maximum medical improvement. He limited claimant to occasional lifting of up to 50 pounds and recommended he avoid any sustained or awkward postures of the lumbar spine. Claimant was also advised to avoid bending, pushing, pulling, twisting or lifting activities on a permanent basis. Dr. Amundson was provided the task analysis prepared by Richard Santner on behalf of respondent. Mr. Santner identified twenty-two separate work tasks, of which Dr. Amundson indicated claimant could no longer perform nine, resulting in a 41 percent task loss.

When asked about claimant's onset of symptoms, Dr. Amundson acknowledged that a sudden onset of pain while handling sheetrock would indicate that activity could have aggravated, intensified or worsened claimant's preexisting condition. He acknowledged after reviewing the x-rays from 1997 and 1999, there was some worsening of claimant's condition, indicating more slippage in 1999 than in 1997.

Claimant was referred by his attorney to orthopedic surgeon Edward J. Prostic, M.D., for an evaluation. Dr. Prostic examined claimant on May 4, 1999. The history provided to Dr. Prostic indicated that claimant began developing symptoms around February 18, 1999, and by February 24, 1999, was unable to complete his work day. Dr. Prostic also examined the x-rays from 1997 and 1999, diagnosing the progression of claimant's slippage over the two-year interval. He diagnosed grade I spondylolisthesis with disc space narrowing at L5-S1. He concluded that claimant suffered repetitive minor traumas through February 1999, resulting in an aggravation of his preexisting

spondylolisthesis while at work. Dr. Prostic was provided the task analysis prepared by Michael Dreiling, claimant's expert. Of the thirteen tasks on Mr. Dreiling's list, Dr. Prostic felt claimant incapable of performing nine, for a 69.23 percent loss of tasks.

Claimant was unable to return to work with respondent. In June 1999, he obtained employment with Equus, doing customer service work. He worked there from June 10, 1999, through July 21, 2000, earning $10.75 an hour for a 40-hour week. Equus did have health insurance as a fringe benefit, but the record contained no value to that fringe benefit. He worked for Electronic Business Solutions (EBS) from July 25, 2000, until he had surgery on October 17, 2000, making $12 an hour, no overtime.

Claimant began working for H&R Block on January 15, 2001, making $9.75 an hour and working overtime. However, there is no indication in the record as to how much overtime he worked.

After leaving H&R Block, claimant worked for Kelly Services at $12 an hour, 40 hours per week, for three weeks. No fringe benefits were provided.

At the time of the regular hearing, claimant was working at Risk Management Alternatives, handling inbound collection calls for Capitol One. He was making $10.25 an hour, working 40 hours a week, with no fringe benefits.

Both Mr. Dreiling and Mr. Santner testified that claimant would be capable of making $12 an hour, 40 hours per week, with his education, experience and training. They also testified that claimant would be capable of being provided a fringe benefit package, but once again the record contained no value for that fringe benefit package.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence. *See* K.S.A. 1998 Supp. 44-501 and K.S.A. 1998 Supp. 44-508(g).

The Board acknowledges claimant's history of injury is somewhat confused. At times, claimant discussed a specific onset on February 24, 1999, while at other times, he discussed a gradual onset from February 18 through February 24, 1999. All histories, however, are consistent in that the increase in symptoms occurred as a result of claimant's manhandling 100-pound sheets of 5/8-inch sheetrock.

There is some controversy raised by claimant's foreman, Mr. Van Horn, and claimant's coworker, Mr. Mitchell, about whether claimant acknowledged suffering an accidental injury on the date or dates alleged. Claimant advised he was unaware that he had suffered an injury at the time they questioned him, because he did not feel that he had suffered a specific isolated event which he would call an injury.

It is well established under the workers' compensation law of Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident. Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 573 P.2d 1036 (1978). The risk of employing a worker with a preexisting condition, thereby making the worker susceptible to injury, falls on the employer. Chinn v. Gay & Taylor, Inc., 219 Kan. 196, 547 P.2d 751 (1976).

The Board finds in this instance that more probably than not, claimant's work aggravated his preexisting spondylolytic condition causing the condition to worsen. The Board, therefore, finds that claimant did suffer accidental injury arising out of and in the course of his employment with respondent. Claimant is entitled to a functional impairment of 22.5 percent to the body as a whole pursuant to the stipulation of the parties.

As claimant was unable to return to work with respondent, the Board must next consider, under K.S.A. 1998 Supp. 44-510e, whether claimant is entitled to an award of permanent partial general disability. K.S.A. 1998 Supp. 44-510e(a) defines permanent partial general disability as:

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

As noted above, both Dr. Prostic and Dr. Amundson gave opinions regarding claimant's ability to perform tasks. In considering both Dr. Prostic's 69 percent task loss and Dr. Amundson's 41 percent task loss, the Board finds claimant has suffered a 55 percent loss of task performing ability.

The Board must next consider whether claimant is entitled to a work disability in excess of his percent of functional impairment before determining compensation based upon his actual loss of wages. In doing so, the Board must consider whether claimant violated the policies set forth in Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997). In Copeland, the Court of Appeals held that if a claimant, post injury, does not put forth a good faith effort to obtain employment, then the trier of fact is obligated to impute a wage based upon the evidence in the record as to claimant's ability to earn wages. In this instance, the Administrative Law Judge found, and the Board agrees, that claimant did put forth a good faith effort to obtain employment. Therefore, the Board will not impute a wage, but instead will use the actual wages earned by claimant after leaving respondent. Claimant has worked several jobs since leaving respondent's employment.

For the period February 25, 1999, through June 9, 1999, claimant was obtaining training for future employment. During that period of time, the Board finds claimant had a 100 percent loss of wages. *See* Hanser v. Sirloin Stockade, WCAB No. 216,417 (Aug. 1999). As of June 10, 1999, claimant obtained employment with Equus, earning $10.75 an hour on a 40-hour week. This equates to a weekly wage of $430 which, when compared to claimant's average weekly wage of $1,087.20, results in a 60 percent wage loss. Claimant worked for Equus through July 21, 2000, and the Board finds a 60 percent wage loss through that period of time.

Claimant then worked for EBS from July 25, 2000, making $12 an hour, no overtime, until he had surgery on October 17, 2000. This equates to a $480 weekly wage and a resulting 56 percent wage loss.

Claimant appears to have been off work until January 15, 2001, when he obtained work with H&R Block, earning $9.75 an hour, full time. While claimant acknowledged he worked overtime for H&R Block, there is no indication in the record as to how much overtime was actually worked. Taking $9.75 an hour times 40 hours a week equals a $390 wage which computes to a 64 percent wage loss during this period.

After working for H&R Block, claimant worked for Kelly Services at $12 an hour. This computes to $480 per week which equates to a 56 percent wage loss.

Thereafter, claimant went to work for Risk Management Alternatives, making $10.25 an hour, 40 hours per week, with no fringe benefits. This equates to a weekly wage of $410 which equates to a 62 percent wage loss. As of the time of regular hearing, claimant was still employed at Risk Management Alternatives.

The Board acknowledges the period of October 17, 2000, through January 14, 2001, does not equate to the 17 weeks for which claimant was paid temporary total disability compensation as noted in the stipulation of the parties. However, the record is unclear as to what period the 17 weeks of temporary total disability included. However, there was no issue raised regarding the temporary total disability compensation, and as it is claimant's burden to prove his entitlement to benefits, the Board finds that other than the 17 weeks temporary total disability compensation stipulated by the parties, claimant has failed to prove entitlement to any additional temporary total disability compensation.

Additionally, claimant is awarded future medical treatment upon application to and approval by the Director and unauthorized medical treatment up to the statutory maximum upon presentation of an itemized statement verifying same.

There was some question regarding the computation of the award by the Administrative Law Judge. As this award modifies the ultimate work disability award of the Administrative Law Judge, that computation question is rendered moot.

The Board awards claimant the following work disabilities computed upon a 55 percent loss of tasks, averaged with the following wage losses:

For the period February 25, 1999, through June 9, 1999, claimant is entitled to a 100 percent wage loss and a 55 percent task loss, for a 77.5 percent permanent partial general body disability, resulting in 15 weeks permanent partial disability compensation at the rate of $366 per week.

For the period June 10, 1999, through July 21, 2000, claimant is entitled to a work disability based upon a 55 percent task loss and a 60 percent wage loss for a 57.5 percent work disability, resulting in 58.14 weeks permanent partial disability compensation at the rate of $366 per week.

For the period July 25, 2000, through October 16, 2000, claimant is entitled to 12 weeks permanent partial disability compensation based upon a 55 percent task loss and a 56 percent wage loss for a work disability of 55.5 percent.

Between October 17, 2000, his date of surgery, and January 14, 2001, claimant was paid temporary total disability and is entitled to no work disability.

For the period January 15, 2001, through April 20, 2001, while working for H&R Block, claimant is entitled to a 55 percent task loss and a 64 percent wage loss, resulting in a 59.5 percent permanent partial disability at the rate of $366 per week for 13.71 weeks.

For the three-week period after April 21, 2001, while working for Kelly Services, claimant is entitled to a 55 percent task loss and a 56 percent wage loss for a 55.5 percent permanent partial disability.

Thereafter, while employed with Risk Management Alternatives, claimant is entitled to a 62 percent wage loss and a 55 percent task loss for a 58.5 percent permanent partial general body disability, for a total award of $94,651.26.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler dated November 30, 2001, should be, and is hereby, modified, and an award is granted in favor of claimant Dwayne Kelly Scott and against respondent Total Interiors, Inc., and its insurance carrier CNA Insurance Company for an injury occurring on February 24, 1999.

Claimant is entitled to 15 weeks permanent partial disability compensation at the rate of $366 per week totaling $5,490 for the period February 25, 1999, through June 9, 1999, for a 77.5 percent permanent partial general body disability. As of June 10, 1999, claimant is entitled to an additional 58.29 weeks permanent partial disability compensation (through July 21, 2000) at the rate of $366 per week totaling $21,334.14 for a 57.5 percent work disability. Thereafter, for the period July 25, 2000 through October 16, 2000, claimant is entitled to 12 weeks permanent partial disability at the rate of $366 totaling $4,392 for a 55.5 percent permanent partial disability. Thereafter, claimant is entitled to 17 weeks temporary total disability compensation at the rate of $366 per week totaling $6,222 for the period October 17, 2000, through January 14, 2001. Thereafter, claimant is entitled to an additional 13.71 weeks permanent partial disability compensation at the rate of $366 per week totaling $5,017.86 for the period January 15, 2001, through April 20, 2001, for a 59.5 percent permanent partial disability. Thereafter, claimant is entitled to an additional 3 weeks permanent partial disability compensation at the rate of $366 per week totaling $1,098 for the period April 21, 2001, and three weeks thereafter, for a 55.5 percent permanent partial disability. Thereafter, while employed with Risk Management Alternatives, claimant is entitled to an additional 139.61 weeks permanent partial disability compensation at the rate of $366 per week totaling $51,097.26 for a 58.5 percent permanent partial general body disability, for a total award of $94,651.26.

As of August 20, 2002, claimant would be entitled to 17 weeks temporary total disability compensation at the rate of $366 per week totaling $6,222, followed thereafter by a 164.86 weeks permanent partial disability compensation at the rate of $366 per week totaling $60,338.76, for a total due and owing of $66,560.76. Thereafter, claimant is entitled to 76.75 weeks permanent partial disability compensation at the rate of $366 per week totaling $28,090.50 to be paid weekly until fully paid or until further order of the Director.

Claimant is additionally awarded unauthorized medical up to $500 upon presentation of an itemized statement verifying same.

Future medical benefits are awarded upon application to and approval by the Director.

The costs of the proceedings of this matter are taxed against the respondent and its insurance carrier as follows:

Metropolitan Court Reporters	$411.60
Hostetler & Associates, Inc.	$715.90
Richard Kupper & Associates	$539.50

Gene Dolginoff Associates, Ltd. $641.15

IT IS SO ORDERED.

Dated this ____ day of August 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
Timothy G. Lutz, Attorney for Respondent
Robert H. Foerschler, Administrative Law Judge
Director, Division of Workers Compensation